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# IN THE
# COURT OF APPEALS OF INDIANA

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| WARREN P. THAYER, JR., | ) | |
| | ) | |
| Appellant-Petitioner, | ) | |
| | ) | |
| vs. | ) | No. 79A02-0706-CV-454 |
| | ) | |
| JOAN C. THAYER, | ) | |
| | ) | |
| Appellee-Respondent. | ) | |

APPEAL FROM THE TIPPECANOE SUPERIOR COURT
The Honorable Thomas H. Busch, Judge
Cause No. 79D02-0511-DR-303

**April 11, 2008**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**ROBB, Judge**

## Case Summary and Issue

Warren Thayer appeals the trial court's order requiring him to pay his ex-wife, Joan Thayer, half of the value of their marital residence pursuant to the terms of an antenuptial agreement. On appeal, Warren raises one issue, which we restate as whether the trial court properly concluded Joan was entitled to half of the value of the marital residence. Concluding the trial court's decision to award half of the value of the marital residence to Joan was proper, we affirm.

## Facts and Procedural History

On December 4, 2003, two days before their marriage, Warren and Joan executed an antenuptial agreement (the "Agreement"). The Agreement recited the parties' intent "that the rights of each other under the law in and to the property of the other . . . at the termination of the marriage, shall be fixed by and shall not be different from those as provided for in this Agreement" and provided that property held individually by each party prior to the marriage remained separate property, free from any claim by the other party. Appellant's Appendix at 94. The Agreement also contained the following relevant provisions regarding property acquired during the marriage:

> 6. . . . [I]n the event the parties deposit individual earnings and income into a bank account that is jointly held between the parties, then at the death of one party, the surviving spouse shall be entitled to the entire balance of such account.
> . . .
> 9. It is further agreed that notwithstanding any of the other provisions set forth in this Agreement, should the parties hereto acquire title to any property as tenants by the entireties . . . the entire title to such property shall immediately vest in the survivor upon the death of either party hereto; and in the event that the parties hereto suffer simultaneous death, then the title to such property shall vest in accordance with the laws of descent of the State of Indiana.

> . . .
> 15. Nothing in this Agreement shall prevent either party from giving to the other party any property or right in property set out as separate property herein; however, the provisions of this Agreement shall not be construed as requiring either party to do so.

Id. at 96-98. On March 30, 2004, Warren and Joan purchased a home located at 8641 Match Point Court in Indianapolis (the "Residence"), recording title in their names as joint tenants by the entireties. Warren used funds he owned prior to the marriage to purchase the Residence, and Joan used funds she owned prior to the marriage to improve the Residence.

On November 17, 2005, Joan filed a petition for dissolution of marriage. On April 22, 2007, the trial court entered an order disposing of the Residence. Relying on some of the provisions quoted above, the trial court found that "the parties by their antenuptial agreement intended to avoid any equitable determination and instead agreed to divide their property according to the terms of the antenuptial agreement," and that based on an interpretation of the Agreement, "the parties have an equal right to the residence and it should be equally divided between the parties." Id. at 5. Based on these findings, the trial court concluded that Joan was entitled to $136,750, which represented half of the value of the residence. On May 25, 2007, the trial court entered a dissolution decree that incorporated the April 25, 2007, order and dissolved the parties' marriage. Warren now appeals.

## Discussion and Decision

### I. Standard of Review

This court has described the standard of review to apply in cases such as this one where the trial court sua sponte enters findings of fact and conclusions of law:

> In reviewing the judgment, we first determine whether the evidence supports the findings, and then whether the findings support the judgment. Findings are clearly erroneous only when the record contains no facts to support them either directly or by inference. A judgment is clearly erroneous if it applies the wrong legal standard to properly found facts. In order to determine that a finding or conclusion is clearly erroneous, our review of the evidence must leave us with the firm conviction that a mistake has been made. Where the trial court issues sua sponte findings of fact and conclusions thereon . . . the sua sponte findings control only as to the issues they cover and a general judgment will control as to the issues upon which there are no findings. A general judgment entered with findings will be affirmed if it can be sustained on any legal theory supported by the evidence.

Schmidt v. Schmidt, 812 N.E.2d 1074, 1080 (Ind. Ct. App. 2004) (citations omitted).

Resolution of this appeal turns on whether the trial court properly concluded the Agreement controlled disposal of the Residence and, if so, whether the trial court's interpretation of the Agreement's terms regarding disposal was proper. In this respect, we note that antenuptial agreements are interpreted in the same manner as any other legal contract. Pardieck v. Pardieck, 676 N.E.2d 359, 363 (Ind. Ct. App. 1997), trans. denied. Our overriding concern in interpreting a contract is to give effect to the parties' intentions as expressed in the language of the contract. Id. Accordingly, we read a contract as a whole in an attempt to harmonize its provisions and will not rely on extrinsic evidence to resolve ambiguity unless we can say that reasonably intelligent persons would differ as to the meaning of a particular term. Rose v. Rose, 526 N.E.2d 231, 236 (Ind. Ct. App. 1988), trans. denied.

## II. Propriety of Trial Court's Decision

A. Scope of Agreement

The trial court concluded that the Agreement controlled disposal of the Residence in the event of divorce. Warren argues this conclusion was erroneous because the Agreement did not specify how to dispose of joint property such as the Residence in the event of divorce. To support this argument, Warren cites Bressler v. Bressler, 601 N.E.2d 392, 396 (Ind. Ct. App. 1992), for the proposition that when an antenuptial agreement does not specify how a particular piece of property should be disposed of in the event of divorce, "distribution . . . must be made independently of the Antenuptial Agreement." Appellant's Brief at 10.

Warren's argument construes the proposition stated in Bressler too broadly. The trial court in Bressler disposed of certain real and personal property pursuant to the terms of an antenuptial agreement. In reversing the trial court's decision, a panel of this court noted that the antenuptial agreement referred only to the wife's "relinquishment of rights as a surviving spouse under the laws of descent and distribution, and inheritance" and said nothing about "property division in the event of divorce." Id. Indeed, the closest the antenuptial agreement came to referencing divorce was a clause stating that property the husband acquired before the marriage "shall remain forever his personal estate." Id. The court, however, rejected the husband's argument that this clause created ambiguity regarding whether the antenuptial agreement applied in the event of divorce, reasoning instead that the antenuptial agreement purported to preclude the wife from asserting her rights as a surviving spouse only in the event of the husband's death. Thus, Bressler stands for the proposition that in a dissolution of marriage action, a trial court cannot divide property pursuant to the terms of an antenuptial agreement where the agreement does not purport to apply in the event of divorce.

Here, the Agreement contains broader language regarding its applicability in the event of divorce than the antenuptial agreement in Bressler does. The Agreement's recitals state that "the parties desire and intend to clarify what their respective rights are to be in the property of the other, and to limit their respective rights in the property of the other . . . upon [the marital relationship's] termination" and that "the parties desire that the rights of each other under the law in and to the property of the other . . . at the termination of the marriage, shall be fixed by and shall not be different from those as provided for in this Agreement." Appellant's App. at 94. Moreover, paragraph seventeen of the Agreement states that "[i]n the event of separation and/or dissolution of the marriage, instituted by either party, each party hereto represents to the other that each shall cause this agreement to be enforced against the other party and hereby waive any defense as to the enforceability of this Agreement." Id. at 98. These provisions foreclose any possibility that the proposition expressed in Bressler applies to this case. Thus, we agree with the trial court that because the Agreement purports to apply in the event of divorce, the Residence must be divided pursuant to its terms.

B. Disposal of Residence

Although the Agreement governs the disposal of property in the event of divorce, the question remains how the Residence should be disposed of. The trial court interpreted the Agreement as requiring that the Residence "be equally divided between the parties." Appellant's App. at 5. This interpretation was apparently based on two theories: 1) Warren and Joan's use of funds to purchase and improve the property constituted gifts to one another as permitted by the Agreement; and 2) Warren and Joan owned the Residence as joint tenants

by the entireties and therefore it should be disposed of pursuant to statutory rules regarding the disposal of such property.

Putting to the side the first theory, we note initially that we agree with the trial court that the Agreement does not provide explicit guidance on how to dispose of joint property in the event of divorce. Nevertheless, statutory rules regarding the disposal of joint property provide the answer. Indiana Code section 32-17-3-2 states, "If a husband and wife are divorced while a contract described in section 1(a) of this chapter is in effect, the husband and wife own the interest in the contract and the equity created by the contract in equal shares." Subsection 1(a) refers to a "written contract in which a husband and wife . . . purchase real estate," Ind. Code § 32-17-3-1(a), and subsection 1(b) states that such a contract "creates an estate by the entireties in the husband and wife," Ind. Code § 32-17-3-1(b). As mentioned above, Warren and Joan agree they purchased the Residence as tenants by the entireties. See Appellant's Br. at 2 (stating that the Residence "is titled in the names of Warren P. Thayer Jr. and Joan C. Thayer"); Appellee's Brief at 2 ("The parties took title [to the Residence] as husband and wife by deed . . . ."). Applying Indiana Code section 32-17-3-2 to the Agreement, we conclude that dissolution of the parties' marriage converted the Residence from a joint tenancy by the entirety to a tenancy in common. As a tenant in common, Joan owned an undivided one-half interest in the Residence. Accordingly, the trial court properly concluded Joan was entitled to half of the value of the Residence.

## Conclusion

The trial court properly concluded Joan was entitled to half of the value of the marital residence.

Affirmed.

MATHIAS, J., concurs.

FRIEDLANDER, J., dissents with separate opinion.

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**FRIEDLANDER, Judge**, **dissenting**

I believe the trial court erred in dividing the marital residence and therefore would reverse.

If there were no antenuptial agreement in this case, the trial court would have divided the property utilizing the standard principles of property distribution in a dissolution action, as set out in Ind. Code Ann. § 31-5-7-4 (West, PREMISE through 2007 1st Regular Sess.). Presumably, pursuant to those principles, the fact that Husband paid the entire purchase price of $259,000.00 with funds he brought into the marriage and the fact that the marriage was of short duration may well have justified an unequal division of the marital residence – the only disputed asset. *See, e.g.*, *Doyle v. Doyle*, 756 N.E.2d 576, 579 (Ind. Ct. App. 2001) ("[a]n unequal division of marital property is justified where a party can demonstrate that certain marital property was acquired by one spouse prior to the marriage, that the other spouse made no contribution toward the acquisition … and the funds were never commingled with

joint marital assets"). The trial court determined, however, and the Majority agrees, that the distribution of that asset must be made pursuant to the antenuptial agreement (the Agreement). I believe that regardless of which method is employed, the trial court erred in dividing the marital residence equally between the parties.

"Antenuptial agreements are legal contracts by which parties entering into a marriage attempt to settle their respective interests in the property of the other during the course of the marriage and upon its termination." *Magee v. Garry-Magee*, 833 N.E.2d 1083, 1087 (Ind. Ct. App. 2005). Such agreements are favored by the law and should be liberally construed to realize the parties' intentions. *Daugherty v. Daugherty*, 816 N.E.2d 1180 (Ind. Ct. App. 2004). The Majority concludes that the Agreement governs the purchase of the house primarily, as I understand it, because "the Agreement purports to apply in the event of divorce." *Slip op.* at 6. Presumably, this reflects the Majority's view that the Agreement, by its terms, was intended to be the sole source of authority governing the division of marital assets in the event of divorce. Accepting this proposition as true for the sake of argument, what does the Agreement say about dividing the marital residence? According to the Majority, it "does not provide explicit guidance on how to dispose of joint property in the event of divorce." *Id*. at 7. I agree with that statement. Where do we obtain guidance when the governing document makes no provision about the distribution of the marital residence? The Majority ultimately turns to Ind. Code Ann. § 31-17-3-2 (West, PREMISE through 2007 1st Regular Sess.), which sets forth the statutory rules regarding the disposal of joint property. According to that provision, Husband and Wife owned as tenants in common, meaning they each owned a one-half interest in the house.

In my view, this approach thwarts the parties' primary intention in entering into the Agreement in the first place. Moreover, it does so utilizing the seemingly incongruous rationale that the Agreement controls but does not explicitly provide for the division of this particular kind of asset and thus the apportionment must be made after resorting to something outside the Agreement, i.e., I.C. §§ 31-17-3-1 and –2. Further, this rationale rejects the applicability of another outside source and its equitable approach, i.e., I.C. § 31-5-7-4, because the Agreement is the exclusive source defining the parties' rights in marital property. More incongruity. In the end, I fear the Majority's approach has, through purported fealty to the Agreement, thwarted the primary intent of the parties in executing that Agreement in the first place.

I believe it is clear that the parties intended through the Agreement to modify the operation and effect of I.C. § 31-5-7-4, which provides that property owned by either party individually before the marriage is included in the marital pot subject to a presumptive equal division in dissolution proceedings. They sought through the Agreement to preserve to each, in the event of death or divorce, ownership of the property they brought individually into the marriage. In fact, I believe that was the primary intention of the parties in entering into the Agreement. On the facts of this case, that goal could be achieved by awarding to each party the percentage he or she contributed to the total value of the residence, that percentage being the amount each paid to purchase or improve the home, divided by the total contribution made by both. Coincidentally, the distribution arrived at through that interpretation of the Agreement yields the same result as would be achieved by disregarding the Agreement as

inapplicable and applying instead the traditional principles of property division set out in I.C. § 31-5-7-4.

I would reverse and apportion the marital residence consistent with the views expressed in this separate opinion.